



BY ELECTRONIC MAIL AND FAX

August 22, 2011

Mary L. Schapiro  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: Bringing Sunlight to the  
SEC-NARA Discussions

Dear Chairman Schapiro:

Both the National Archives Records Administration (NARA) and the Commission have informed the media they are engaged in discussions regarding the Commission's destruction of files relating to approximately 9,000 preliminary investigations. Unfortunately, it appears the truth may be a victim of those discussions. I make three proposals below on behalf of Mr. Flynn which are all aimed at bringing closure in a lawful manner to the matters disclosed by him to Congress.

First, we request you inform NARA that the MUI files destroyed by the Commission are files of "preliminary investigations" as that term is used in Rule 202.5 of Title 17 of the Code of Federal Regulations and the Enforcement Division's disposition schedule approved by NARA.<sup>1</sup> I have already informed NARA of public information, including records on the Commission's website, which establish these facts (see attached letter).

I understand from journalists that NARA believes MUIs are a third type of inquiry, separate from preliminary and formal investigations. Every current and former Enforcement staff attorney knows this to be untrue. On this faulty premise, NARA concluded that the destruction of files of thousands of preliminary investigations did not violate Enforcement's schedule approved by NARA.<sup>2</sup> Commission spokespersons have either provided this inaccurate information to NARA or remained mute in the face of NARA's mistake.

This could be further complicated if Mr. Kotz should decide to accept NARA's conclusion, even though it is patently erroneous. In that case, Mr. Kotz would not focus his investigation on which Enforcement staff authorized the departure from the NARA schedule. Rather, he would logically focus on ascertaining who was responsible for not submitting the schedule to NARA, which would of course be you and each of your predecessors under federal

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<sup>1</sup> Available at: [http://www.archives.gov/records-mgmt/rcs/schedules/independent-agencies/rg-0266/n1-266-91-002\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/independent-agencies/rg-0266/n1-266-91-002_sf115.pdf)

<sup>2</sup> Enforcement's operative destruction schedule, as approved by NARA, explicitly applies to "preliminary investigations." See NARA website at: [http://www.archives.gov/records-mgmt/rcs/schedules/independent-agencies/rg-0266/n1-266-91-002\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/independent-agencies/rg-0266/n1-266-91-002_sf115.pdf).

law.<sup>3</sup> I respectfully submit that you have a duty to inform NARA of its mistake.

Second, although it may not be required, I am requesting you consent that Mr. Flynn may discuss nonpublic information during the meeting which I have proposed in the attached letter. It would include Mr. Flynn, a representative of NARA, a representative of the Commission's IG office, and the undersigned. This meeting would deal with the issue raised in the first request above as well as the accuracy of Commission statements made to the media and presumably to NARA regarding the scope of the MUI records destroyed prior to the policy change in July 2010.

Third, and alternatively, Mr. Flynn would be willing to assist the agency in accurately presenting the relevant facts to NARA.

I would urge you to consider the words of Supreme Court Justice Louis D. Brandeis many years ago: "[S]unlight is said to be the best of disinfectants." The Enforcement Division has destroyed thousands of files in violation of federal law, while telling NARA the records were preserved. It will not enhance the Commission's credibility to negotiate the truth behind closed doors with NARA.

Kindly have the agency respond to our proposals by August 26, since this matter seems to be moving rapidly and we may need to consider other options.

Sincerely,



Gary J. Aguirre

Attachment

cc: Luis A. Aguilar, Commissioner, U.S. Securities and Exchange Commission.  
Troy A. Paredes, Commissioner, U.S. Securities and Exchange Commission.  
Elisse B. Walter, Commissioner, U.S. Securities and Exchange Commission.  
Mark D. Cahn, General Counsel, U.S. Securities and Exchange Commission.  
David H. Kotz, Inspector General, U.S. Securities and Exchange Commission.

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<sup>3</sup> See 44 USC § 3303 which provides in relevant part, "The head of each agency of the United States Government shall submit to the Archivist .... (3) schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character..."